STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CONCRETE CONSTRUCTION ASSOCIATES, Plaintiff-Appellant, v WALBRIDGE ALDINGER COMPANY, Defendant-Appellee.	UNPUBLISHED November 2, 2006 No. 269482 Oakland Circuit Court LC No. 2004-060980-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiff National Concrete Construction Associates (National) appeals as of right from an order granting defendant summary disposition on all three of National's claims: breach of contract, account stated, and unjust enrichment. We affirm as to the breach of contract and account stated claims. Although we hold that the trial court's legal justification for dismissing he unjust enrichment claim was incorrect, we affirm the dismissal of that claim as well, albeit on different grounds.

Defendant Walbridge Aldinger Company (Walbridge) was the general contractor for some construction work at the Detroit Metropolitan Airport. In March 2004, defendant awarded plaintiff, as the lowest bidder at $1,556,373, a subcontract for certain concrete jobs. Plaintiff further subcontracted with other companies for placement of steel rebar and other matters. The terms of the contract between defendant and plaintiff required plaintiff to post labor and material bonds and a performance bond for the full value of the contract, or plaintiff would not be awarded the contract. Despite making repeated assurances that plaintiff would do so, and a letter from a surety agency stating that it would assist plaintiff in posting the bonds, plaintiff never did in fact post any of the bonds.

Defendant nevertheless permitted plaintiff to begin work in May or early June 2004. Defendant asserts that plaintiff fell behind in the schedule and performed unacceptable work. On July 8, 2004, defendant terminated the contract with plaintiff and hired a replacement to finish and redo plaintiff's work. Defendant paid $1,588,000 to the replacement subcontractor, and further paid $107,867.66 to plaintiff's subcontractors when plaintiff failed to do so. Plaintiff filed this suit against defendant on September 9, 2005, and the trial court granted defendant summary disposition on all three claims. We review decisions on motions for summary disposition de novo. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002).

Plaintiff first argues that the trial court erred in dismissing its breach of contract claim because defendant waived the bond requirement. We disagree.

Plaintiff agreed to a contract explicitly stating that "[a]t the request of the Contractor, the Subcontractor shall furnish Performance and Payment Bonds." Contract, Article XXV. To quell defendant's concerns about plaintiff's performance, plaintiff assured defendant that it could provide the bonds, and it supported that assurance with a letter from its surety agent. The surety agent stated that it was ready to issue the required bonds if the project was awarded to plaintiff. When plaintiff continually failed to post the required bonds, defendant affirmatively and repeatedly warned plaintiff that it would terminate the contract if plaintiff did not post the bonds. We have explained that:

> Waiver is defined as the intentional and voluntary relinquishment of a known right. It necessarily follows that conduct that does not express any intent to relinquish a known right is not waiver, and a waiver cannot be inferred by mere silence. *Moore v First Sec Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997).

Defendant's actions throughout its dealings with plaintiff show that it did not intend to relinquish its contractual rights, nor was it silent on the matter of obtaining the proper bonds. Furthermore, unlike the parties in the authority plaintiff cites, defendant's actions were not inconsistent with the terms of the contract.

Plaintiff next argues that the trial court erred in dismissing its breach of contract claim because the contract is ambiguous. We disagree. Plaintiff does not specifically explain what language in the contract is ambiguous. Conversely, defendant cites to Article XXV, which we have quoted above, and we are persuaded that this language unambiguously made the bonds due when defendant requested them. Additionally, the bonds were for the purpose of protecting defendant against a situation where plaintiff proved unable to make certain payments to plaintiff's vendors and employees. Therefore, we find unreasonable plaintiff's assertion that the bonds were not required before, or at least soon after, commencing performance. "The fact that each party is advocating a definition that supports its desired outcome in a case of first impression does not make a phrase ambiguous." *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 355; 596 NW2d 190 (1999).

Plaintiff next argues that there is a genuine factual dispute regarding its account stated claim. We disagree. Our Supreme Court long ago explained:

> An account stated means a balance struck between the parties on a settlement; and, where a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance. *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888).

Plaintiff relies on its three payment applications that it submitted to defendant. However, there is no evidence that defendant indicated its agreement with the amounts plaintiff submitted, and plaintiff did not even submit the third until after defendant terminated the contract. There is no other evidence that the parties agreed, and the contract termination strongly suggests that they

did not. Unlike the situation in *Keywell and Rosenfeld v Bithell*, 254 Mich App 300, 331-332; 657 NW2d 759 (2002), there has been no long history of payments between the parties and no lengthy period without objection. Defendant paid part of the first payment application, warned plaintiff of its default five days after plaintiff submitted the second application, and terminated the contract before plaintiff even submitted the third. These actions do not in any way indicate "a balance struck," as is required by Michigan law. In any event, an account stated argument "has no application where the claim is the subject of a special contract." *Thomasma v Carpenter*, 175 Mich 428, 435; 141 NW 559 (1913).

Plaintiff finally argues that the trial court erred in dismissing its claim for unjust enrichment. Although the motion for summary disposition was pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of the claim, the trial court's sole reason for granting dismissal of the unjust enrichment claim was a legal conclusion that the claim "must also fail as such a claim may not be found when an express contract exists between the parties." We find this an overly broad statement of the law, and under the circumstances of this case, we find that summary disposition should not have been granted on that basis.

We note initially that "unjust enrichment" appears to be treated in Michigan jurisprudence as merely another name for "quantum meruit," both theories having identical elements and standards. *Keywell*, *supra* at 327-330; *Allen v McKibbin*, 5 Mich 449, 454 (1858) (both cases defining unjust enrichment and quantum meruit, respectively, as an implied contract to pay a plaintiff for a benefit received by a defendant that would be inequitable not to pay for). Implied contracts are either implied in fact, requiring an actual meeting of the minds that merely was not reduced to some formality, or implied in law "to enable justice to be accomplished, even in case no contract was intended." *Cascaden v Magryta*, 247 Mich 267, 270; 225 NW 511 (1929).

A more accurate statement of the interplay between an express contract and unjust enrichment would be that "a contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties." *HJ Tucker and Assoc, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999); see also *Campbell v City of Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972). This is a very long-standing rule. *Boughton v Boughton's Estate*, 111 Mich 26, 27-28; 69 NW 94 (1896). Indeed, it was already a "well settled" principle in some of Michigan's earliest case law that "if there was an express contract, none can be implied." *Galloway v Holmes*, 1 Doug 330, 337 (1844).

However, Michigan courts have explicitly held that if the contract is void or unenforceable, the rule does not apply. *Biagini v Mocnik*, 369 Mich 657, 659-660; 120 NW2d 827 (1963); *Ordon v Johnson*, 346 Mich 38, 48-49; 77 NW2d 377 (1956); *Vanderhoef v Parker Bros Co*, 267 Mich 672, 680-681; 255 NW 449 (1934). Even more significantly, early Michigan jurisprudence began permitting some flexibility regarding quantum meruit recovery where there was a breach of the express contract, even by the plaintiff. In theory:

> Where a party fails to comply substantially with an agreement, unless it is apportionable, the rule is well settled that he can not sue upon the agreement, or recover upon it at all. And under the strict common law rule he was remediless. But the doctrine has now grown up, based upon equitable principles, that where anything has been done from which the other party has received substantial

> benefit, and which he has appropriated, a recovery may be had upon a quantum meruit, based on that benefit. And the basis of this recovery is not the original contract, but a new implied agreement, deducible from the delivery and acceptance of some valuable service or thing. *Allen*, *supra* at 454.

However, a defaulting plaintiff may never recover more than its services would have been worth, more than could have been permitted under the contract, or more than the cost of the same services obtained elsewhere. *Id*., 454. The Court summarized the rule as follows:

> The defaulting plaintiff can in no case recover more than the contract price, and can not recover that, if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract. The party in default can never gain by his default, and the other party can never be permitted to lose by it; and the price thus determined is the true amount recoverable on a quantum meruit. *Id*., 455.

In other words, the fact that the parties had, at one point, had an express contract does not *inherently* preclude even a breaching party from seeking, in equity, compensation for any benefit conferred on the non-breaching party.

The trial court's statement appears to have been based on a similar statement made by this Court that was both overstated and out of context. *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 716; 376 NW2d 392 (1985). It appears that this particular statement in *Hull & Smith* was premised on the fact that the quantum meruit proofs advanced by the plaintiff related mostly to the value of the services performed, despite the existence of a fee schedule imposed by the Interstate Commerce Commission, which was the only permissible means for valuation. *Id*., 714-716. In particular, *Hull & Smith* relies on a case holding that an *enforceable* express contract precludes recovery on the basis of an implied contract. *LeZontier v Shock*, 78 Mich App 324, 331; 260 NW2d 85 (1977). The statement in *Hull & Smith* was therefore poorly phrased, but in context it was consistent with the more general rules:

> [If] a party entering into a contract to do certain work, for a consideration to be paid at a certain time, after the completion thereof, or to a certain party, or to be applied upon a certain note or account upon completion of his job, could abandon the contract just before completion, when the principal part of the consideration had been earned, sue at once upon the quantum meruit, and if permitted to recover, thus, by his own wrongful act, defeat the intention and terms of the agreement which he had previously solemnly entered into . . . it [would be] an inducement for parties to violate their agreements wherever they would be the gainers thereby. It is a mistake to suppose that upon a quantum meruit, where the plaintiff has broken his contract, the express contract is lost sight of, except as it may limit the amount to be recovered. The party who has violated his agreement can, where he has in good faith endeavored to perform, sue upon a quantum meruit, and recover upon the work actually done, if consistent with his agreement except as to complete performance. In other words, where a party has violated his agreement, he cannot then, upon a quantum meruit, recover a judgment for the value of the work and labor done, and thus convert into cash payments what,

> according to his special agreement, were upon time, or payable in something else than money. *Roberts v Wilkinson*, 34 Mich 129, 135 (1876).

In other words: unjust enrichment or quantum meruit is not an available remedy by which a breaching party may gain a profit or, indeed, gain anything to which he or she would not have been entitled under the contract.

"Pursuant to MCR 2.111(A)(2), plaintiff was entitled to bring alternative counts of breach of [express] contract and implied contract." *Tucker*, *supra* at 573. A plaintiff may only *recover* on one of those theories, and consistent with the above rules, may never recover anything to which he or she would not have been able to recover had the contract been fully performed. Furthermore, an implied contract may not contradict any currently enforceable terms of an express contract. However, where an express contract is *no longer in force*, at least as to the relevant terms, a plaintiff is not necessarily precluded from recovering on an implied contract theory. *Id*.

We nevertheless uphold the trial court's grant of summary disposition, albeit on substantive grounds rather than legal grounds. Unjust enrichment is an equitable theory premised on unjust retention by a defendant of some benefit. Here, the contract price was $1,556,373, and plaintiff claimed that defendant failed to pay approximately $340,000 for completed work. Defendant's motion for summary disposition indicates that, after it terminated the contract because of plaintiff's breach, defendant entered into a contract with a replacement subcontractor for $1,588,000, that it had already paid $1,567,296 to correct and complete plaintiff's work, that the work was not yet complete, that the final cost to complete the project would exceed $1,750,000, and that defendant had paid $107,867 to plaintiff's subcontractors, suppliers, and laborers, who had not been paid by plaintiff. Defendant submitted an affidavit by its project director who oversaw the construction, and the affidavit avers that the facts set forth in the motion and brief are true and accurate and are based on his personal knowledge. These facts were not countered by plaintiff in any manner when it responded to defendant's motion for summary disposition, and no conflicting documentary evidence was provided.

Taking into consideration the principles concerning unjust enrichment discussed above and the unchallenged facts regarding defendant's actions and costs that resulted from the breach, we fail to see how defendant received any actual benefit from, or was actually enriched by, the work completed by plaintiff. We likewise fail to see any injustice or inequity in precluding recovery by plaintiff. Rather, making defendant pay an additional $340,000 to plaintiff in addition to the costs already incurred, or to be incurred, as a result of plaintiff's breach would appear to be the great inequity. Because there is no express contract currently in force between the parties upon which plaintiff could recover, plaintiff is not legally precluded from asserting and attempting to prove an unjust enrichment claim. The trial court should not have dismissed plaintiff's unjust enrichment claim on that basis. However, the trial court nevertheless reached the correct result.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy